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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT AND APPEAL BOARD

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*Ex parte* CHRISTOPHER P. BERGH, NANCY BENOVIK  
GILBY, CHARLES EVETT, PETER FEAREY, GREGORY  
ERMAN, DAVID TIU, and JOHN MANDEL

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Appeal 2011-000757  
Application 09/575, 283  
Technology Center 3600

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Before, MURRIEL E. CRAWFORD, ANTON W. FETTING, and  
JOSEPH A. FISCHETTI, *Administrative Patent Judges*.

FISCHETTI, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

Appellants have filed a Request for Rehearing under 37 C.F.R. § 41.52(a)(3) (20011) of our Decision of May 31, 2012.

The Decision found that:

The Examiner did not err in rejecting claims 29-51 under 35 U.S.C. 103(a) as being unpatentable over Anderson in view of Griggs and further in view of Netscape/Aurum.

In support there of the Board made the following findings:

1. We adopt the Examiner's findings as set forth on pages 4-13 of the Answer.
2. Appellants' Specification does not specifically define the term rule, nor does it utilize the term contrary to its customary meaning.
3. The ordinary and customary definition of the term rule as defined by Merriam Webster's Collegiate Dictionary (10th ed.) is: "a prescribed guide for conduct or action". <http://www.merriam-webster.com/dictionary/rule>
4. Anderson discloses  
scores for each customer record are computed, preferably, in accordance with an external process which compares customer descriptive information in the customer record with the products and then returns as scores values indicating whether a match would likely exist between the customer record and the products, i.e., returns scores indicating whether a customer associated with the record is likely to buy the products. The customer descriptive information may include, for example, demographic data (e.g., name, address, sex, age of a customer), data describing the nature and peculiarities of a customer's business (e.g., annual sales, geographic coverage, size), or any other

information which might be important in assessing a customer's affinity for a particular product.

(Col. 6, l. 60; 7, l.7).

5. Anderson further discloses that

“[t]he scores may, for example, be computed by developing statistical models with techniques such as logistic regression or rule induction, or techniques based on various forms of neural networks. Such models typically relate prospect demographics (independent explanatory variables) to "propensity to buy" (dependent, business variable) using historical data collected through past marketing campaigns.”

(Col.7, ll. 8-14).

6. The goal of Anderson's scoring system is to allow a predictability of a person buying a product, i.e., “[t]he chance that a client in his fifties would buy and IRA....” (Col.5)

7. Griggs discloses “... leads are then qualified by phone, fax, or on the Internet. Based on this information, the system assigns each lead a "grade" and priority status, then directs it to the appropriate salesperson or channel partner.” (Griggs, p. 2, ¶ 7)

8. Anderson's disclosed score is a rule because it is a guide for determining at least one action, namely a lead for a sale, based on the chance that someone will buy a product. (FF 6). (Decision 6).

9. We construe specific rules as the disclosed dependent, business variables in Anderson which use historical data collected through past marketing campaigns. (Decision 6).

10. We find that the determination of whether a lead is hot or cold is a rating. (Decision 7).

Against these findings the Appellants raise the following points in contradistinction to the Board's Decision:

**Point 1a:**

As to the Appellants' request that the Board designate its rationale as a new grounds of rejection because the Board's reasoning necessarily requires a claim construction that the Appellant did not have the opportunity to respond (*see* Request 2-3). The criterion of whether a rejection is considered "new" in a decision by the Board is whether Appellant has had a fair opportunity to react to the thrust of the rejection. *In re Kronig*, 539 F.2d1300, 1303 (CCPA 1976). In this case, we find that the Appellants did have the opportunity to make the argument to the lack of construction to the two rule types but failed to make it in their Brief. Appellants instead only argued that

The examiner relies on Anderson to teach the feature of a plurality of rules for determining at least one action of the lead processing system with respect to the users, wherein the plurality of rules includes global rules and user specific rules. Appellant contends that Anderson whether taken separately or in combination with the other references neither describes nor renders obvious this feature of claim 29. (Appeal Br.9-10)

This argument is not the same as that presented on Reconsideration, namely:

"the Examiner asserted "[w]hile the rules may be labeled as 'global' and 'user specific', these are simply labels that 16 are not given weight"

(emphasis added). Thus, the Examiner found no difference between the 17 two claimed rules, which is very different from how the Board has treated the claim language.

(Request 2). Thus Appellants had the opportunity to argue the failure to assign weight to each of the terms, but did not do so until the Request which we do not find timely because the issue was present before Appellants at the time the Brief was written. Thus, Appellants were given a fair opportunity to respond to the Examiner's rejection of the actually recited limitation, but instead chose to present an argument direct to a limitation not recited. Since the Appellants had a fair opportunity to respond to the Examiner's rejection, we decline to designate our affirmance as a new ground of rejection under 37 C.F.R. § 41.50(b).

**Point 1 b:** Appellants argue that "Specifically, while the Board construed "global rules" and "specific rules," the claim limitations at issue refer to "global rules" and "user specific rules." The notion that the rules are specific to a user is completely absent from the Board's claim construction." (Request 3).

We disagree with Appellants because just by naming a term *user specific* does not necessarily confer on the term that the rules are specific to a user as Appellants now argue. Appellants' argument thus fails from the outset because it is not based on limitations appearing in the claims. *In re Self*, 671 F.2d 1344, 1348 (CCPA 1982).

Point 2a: Appellants argue that since the Examiner did not rely on *common sense* in the rejection of record, our reliance on it in our Decision is cause for entering a new ground of rejection pursuant to 37 C.F.R. § 41.50(b). (Request 4).

We disagree with Appellants because as of the filing date of Appellant's brief (May, 10, 2010), the *KSR* decision relied on in our Decision was nearly three years old. As such, Appellants are charged with the knowledge of the applicable law during the course of their appeal.

**Point 2b:** Appellants argue that "... the Board's findings are unsupported by substantial evidence, and the Board's reliance upon these unsupported findings constitutes reversible error." (Request 6).

We disagree with Appellants because our decision sets forth in well explained reasoning based on factual findings why a better rated lead would be acted on before and not passed off to another salesperson than a lesser rated lead as follows:

We disagree with Appellants because we find that the determination of whether a lead is hot or cold is a rating. As such, each rating has intrinsic value as a directive of how valuable the lead is, and using common sense a person with ordinary skill in the art would understand that if a lead was marked as cold it should not be acted upon nor passed on, and vice versa. We find this given that Griggs discloses assigning each lead to the appropriate salesperson or channel partner (FF 7). Thus, a viable lead would be assigned/routed until it was acted on. The application of common sense may control the combining of references.

Common sense teaches, however, that familiar items may have obvious uses beyond their primary purposes, and in many cases a person of ordinary skill will be able to fit the teachings of multiple patents together like pieces of a puzzle.

*KSRIntern, Co. v. Teleflex Inc.*, 550 U.S. 398, 419 (2007).

(Decision 7).

**Point 2c:** We are not persuaded by Appellants' argument that the Examiner found that cold leads are sent to salespeople too, and thus violates our common sense logic because what Appellants are seeking to distinguish here is human behavior, which cannot be quantified as Appellants would like to have us believe. Simply because cold leads are sent out does not diminish our finding that common sense dictates that the least acted on leads would be the cold ones as among otherwise hot or warm rated leads.

**Point 2d:** We are also not persuaded that the Board did not address Appellants' arguments to the requirement of *feedback from at least one of the users, the feedback indicating whether the lead should be accepted, rejected or forwarded to another one of the plurality of user*. Here again Appellants miss the fact that claim 29 requires no limitation on how feedback is created except that it is the result of action by a user, and hence is the product of human behavior, which again Appellants wrongly seek to quantify outside of a common sense reaction based on known human behavior.

**Point 3.** Concerning Appellants challenge to the Official Notice taken by the Examiner that it would have been obvious to one of ordinary skill in the art at the time of the invention to employ client-server based technology (Answer 6), we again reiterate our finding made anew that the Examiner applied Official Notice correctly in the rejection<sup>1</sup>.

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<sup>1</sup> Appellants seize on the less precise wording of the Examiner in taking Official Notice of obviousness (Request 10), but we understand from the difference of the Examiner's analysis that the application of Official Notice was only meant to address the well know use of employing client-server based technology rather than being a conclusion of law as Appellants contend as a basis of error. (Request 10).



Citing to *In re Zurko*, 258 F.3d 1379, 1385 (Fed. Cir. 2001), Appellants assert that "... the Board must point to some concrete evidence in the record in support of these findings." (Request 8). Here, we find that *Zurko* is distinguishable from the facts before us. In *Zurko*, the CAFC was clear to point out that it was dealing with a case in which the Notice at issue was taken against "core factual findings"<sup>2</sup>, rather than on the general recitation of using connected servers to move data. In making a rejection, an examiner may "take notice of facts beyond the record which, while not generally notorious, are capable of such instant and unquestionable demonstration as to defy dispute." *In re Ahlert*, 424 F.2d at 1091 (citing *In re Knapp Monarch Co.*, 296 F.2d 230 (CCPA 1961)).

In support of such an instantly recognizable fact, the Examiner even goes so far in the Answer as to make a showing from *Netscape/Aurum* that the generally recited connecting servers as claimed does nothing more than describe the basic workings of the Internet.

The *Netscape/Aurum* reference teaches the lead-tracking system that is carried out over the Internet wherein collected information is transmitted and stored over the Internet. Inherently this transmission of data includes the use of general computers running over the Internet and making use of one or more servers. (Answer 5, 6).

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<sup>2</sup> In *Zurko*, "the Board contended that even if the cited UNIX and FILER2 references did not disclose a trusted path, "it is basic knowledge that communication in trusted environments is performed over trusted paths" and, moreover, verifying the trusted command in UNIX over a trusted path is "nothing more than good common sense." *Ex parte Zurko*, slip op. at 8

Thus, in our view, the Examiner judicially applied assertions that certain facts are well known or common knowledge in the art by providing a technical line of reasoning underlying the determination of obviousness that is clear and unmistakable. We therefore credit the Official Notice of the Examiner with respect to the issue of employing client-server based technology and hence establishing a *prima facie* case as to this element of the combination.

Appellants have not provided any evidence to rebut this finding by the Examiner except to say *circularly* that no *prima facie* case exists so Appellants need not challenge the Official Notice. (Request 10). But, the Board here, having found a *prima case* to have been established, and a proper challenge to it under *In re Chevenard* missing<sup>3</sup>, find no error with the rejection and the required actions of Appellants according to *Chevenard* in reply thereof deficient.

**Point 4.** Concerning the argument to claim 32, we are again unpersuaded by Appellants argument. Claim 29 recites in pertinent part *wherein the rules comprise attachment rules for determining additional information to be attached to the leads prior to further routing of the lead.*

The section of Anderson (col. 8, lines 49-67) which the Decision references, specifically discloses rules which limit additional information e.g., customer contact numbers from being outputted. Since the subject matter of claim 32 is the rules for determining additional information to be

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<sup>3</sup> Appellants' first opportunity to challenge the Official Notice, if in fact the Official Notice was first made in the Final Office Action, was not in their Brief as they assert, but was to the Examiner under as a Request under 37 CFR § 1.116.

attached, we find that Anderson meets this limitation given that its rules are designed to determine that no personal contact information is included prior to outputting/ further routing of the lead, which is a determination that no further information will be added during routing.

For the reasons above, we are not convinced that Appellants have shown with particularity points believed to have been misapprehended or overlooked by the Board in rendering its earlier decision. *See* 37 C.F.R. § 41.52(a)(1) (20011).

Accordingly, Appellants' request for rehearing is DENIED.

DENIED

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